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March 1, 2001

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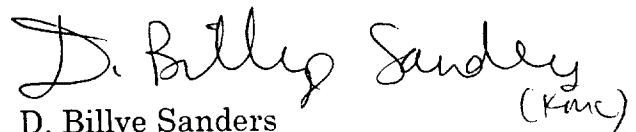
K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37219

Re: Application of Memphis Networx, LLC for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunication Services and Joint Petition of Memphis Light Gas & Water Division, a Division of the City of Memphis, Tennessee ("MLGW") and A&L Networks-Tennessee, LLC ("A&L") for Approval for Agreement Between MLGW and A&L regarding Joint Ownership of Memphis Networx, LLC, as Amended to Substitute Memphis Broadband for A&L; Docket No.99-00909 – Pre-Hearing Brief

Dear Mr. Waddell:

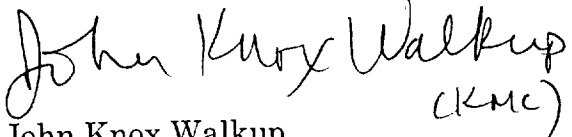
Enclosed you will find the original and thirteen (13) copies of the Pre-Hearing Brief of Memphis Networx, LLC ("Applicant"), and MLGW and Memphis Broadband, LLC ("Joint Petitioners").

Sincerely,


(Kane)

D. Billye Sanders
Waller Lansden Dortch & Davis
A Professional Limited Liability Company

K. David Waddell
February 12, 2001
Page 2


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Wyatt, Tarrant & Combs

DBS:lmb
Enclosures

cc: Parties of Record
Richard Collier, Esq.
Ward Huddleston, Esq.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:)	
)	
APPLICATION OF MEMPHIS)	
NETWORK, LLC FOR A CERTIFICATE OF)	
PUBLIC CONVENIENCE AND)	
NECESSITY TO PROVIDE INTRASTATE)	
TELECOMMUNICATIONS SERVICES)	DOCKET NO. 99-00909
AND JOINT PETITION OF MEMPHIS)	
LIGHT GAS AND WATER DIVISION,)	
A DIVISION OF THE CITY OF MEMPHIS,)	
TENNESSEE ("MLGW") AND A&L)	
NETWORKS-TENNESSEE, LLC ("A&L"))	
FOR APPROVAL OF AGREEMENT)	
BETWEEN MLGW AND A&L REGARDING)	
JOINT OWNERSHIP OF MEMPHIS)	
NETWORK, LLC)	

PRE-HEARING BRIEF OF
MEMPHIS NETWORK, LLC, MLGW AND MEMPHIS BROADBAND, LLC

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PRE-HEARING BRIEF OF
MEMPHIS NETWORKX, LLC, MLGW AND MEMPHIS BROADBAND, LLC
PRE-HEARING BRIEF

I. Introduction

A. Statement of the Case

This case is before the Tennessee Regulatory Authority (the “Authority” or the “TRA”) upon submission of the Application of Memphis Networkx, LLC for a certificate of public convenience and necessity to provide intrastate telecommunications services (the “Application”) and the Joint Petition of Memphis Light, Gas & Water Division (“MLGW”), a Division of the City of Memphis, Tennessee, and A&L Networks-Tennessee, LLC (“A&L”) (collectively “Joint Petitioners”) for approval of the agreement between MLGW and A&L regarding joint ownership of Memphis Networkx, LLC (the “Operating Agreement”). After the transfer of interest from A&L to Memphis Broadband, LLC (“Memphis Broadband”) on November 29, 2000, discussed further below, and the filing of the Amendment to the Application and the Amended and Restated Operating Agreement on December 22, 2000, A&L has been replaced by Memphis Broadband as a Joint Petitioner. Applicant Memphis Networkx is and remains the Applicant in this proceeding.

The procedural history of this case will not be repeated in full in this brief. However, it is important to note and appreciate the time and consideration that the Authority has given to this Application, which is the first application filed pursuant to Tenn. Code Ann. § 7-52-103 (d).

The Application and Joint Petition were filed on November 24, 1999. Hearings were held on the Application and Joint Petition in July, September, and October, 2000. On November 17, 2000 the Applicant and Joint Petitioners filed a Notice of Additional Material Evidence and Motion for Suspension of the Deadline for Filing of Briefs and Findings of Fact and Conclusions of Law. In this Notice the Applicant and Joint Petitioners notified the TRA that A&L had signed an agreement to sell its membership interest in Memphis Networx to Memphis Broadband. On November 17, 2000 the TRA issued a notice suspending the deadline for filing of briefs pending further action of the TRA. At the TRA Conference on November 21, 2000 the TRA referred the matter to the Pre-Hearing Officer pending additional filings by the Applicant and Joint Petitioners regarding the change of ownership. On November 29, 2000 the sale of A&L's membership interest to Memphis Broadband was consummated. MLGW and Memphis Broadband executed an Amended and Restated Operating Agreement as a result of the change in ownership.

An Amendment to the Application and Joint Petition (the "Amendment") reflecting the partial change in ownership of Memphis Networx and seeking approval of the Amended and Restated Operating Agreement was filed on December 22, 2000. In support of the Amendment, pre-filed testimony was filed on December 22, 2000 by Andrew P. Seamons on behalf of Memphis Broadband; by William Larry Thompson on behalf of MLGW; and by Ward Huddleston, Jr. on behalf of Memphis Networx.

At the status conference held on January 29, 2001, Pre-Hearing Officer Collier instructed the parties to brief the three issues originally submitted by the Authority on October 25, 2000, plus one additional sub-issue that was submitted at the status conference. Additional proceedings on the Amendment and the Amended and Restated Operating Agreement have been set for March 26 – 28, 2001.

B. Structure of Applicant

Memphis Networx, LLC, a Tennessee limited liability company, is owned by two members: Memphis, Light, Gas & Water Division (“MLGW”) and Memphis Broadband, LLC (“Memphis Broadband”). MLGW was created by Chapter 381 of the Private Acts of 1939, amending the Charter of the City of Memphis which gave MLGW authority over municipal utility systems. MLGW currently operates a municipal electric system as well as municipal gas and water distribution systems.

Memphis Broadband, LLC is a Delaware limited liability company which is owned by: the Memphis Angels LLC, a Delaware limited liability company (“Memphis Angels”); M-Net 2000, a Tennessee general partnership; Belz Broadband Associates, a Tennessee general partnership; and Joseph R. Hyde, III. Memphis Angels is an investment group created to fund early-stage emerging growth companies located primarily in the Southeast. The principals of the Memphis Angels include a number of prominent Memphis business persons such as: Robert B. Blow, Co-Founder and Managing Director of Paradigm Capital Partners, LLC; William B. Dunavant, Jr. Chairman and Chief Executive Officer of Dunavant Enterprises, Inc.; Thomas M. Garrott, Chairman of National Commerce

Bancorporation; Frederick W. Smith, Chairman, President and Chief Executive Officer of FedEx Corp.; Willard R. Sparks, Chairman of Sparks Companies, Inc. and members of the Kemmons Wilson family of the Wilson Companies. Memphis Broadband will be a manager managed limited liability company under Delaware law, having three individuals selected by its members to serve as managers. These managers include Andrew P. Seamons, Frank A. McGrew, IV, and Ronald A. Belz. A copy of an organizational chart for Memphis Broadband, and a revised organizational chart for Memphis Networx were attached as Exhibit S to the Amendment to the Application.

II. Issue # 1Error! Bookmark not defined.

A. Do Tenn. Code Ann. § 65-25-231(a)(2) and § 7-52-402 apply to the Telecommunications Division of the Electric Division of Memphis Light, Gas & Water? (Only Tenn. Code Ann. § 7-52-402 applies to the Telecommunications Division of the Electric Division.)

1. Tenn. Code Ann. § 65-25-231 (a)(2) does not apply to the Telecommunication Division of the Electric Division of MLGW.

Tenn. Code Ann. § 65-25-231(a)(2) does not apply to either MLGW or its Telecommunications Division. Instead, that statute applies only to electric cooperatives that are formed or operate under the Rural Electric and Community Services Cooperative Act (Tenn. Code Ann. § 65-25-201 et seq.) and to participants in a “telecommunications joint venture” with such a cooperative. The Telecommunications Division of MLGW is neither a cooperative, as that term is

defined at Tenn. Code Ann. § 65-25-202(4),¹ nor a participant in a “telecommunications joint venture” with a cooperative, as that term is defined at Tenn. Code Ann. § 65-25-231(a)(1). MLGW is a municipal utility created by Chapter 381 of the private acts of 1949 amending the Charter of the city of Memphis (see Exhibit 1 to Pre-Hearing Brief of the Applicant and Joint Petitioners filed March 27, 2000.) Accordingly, Tenn. Code Ann. § 65-25-231(a)(2) does not apply to the Telecommunications Division of MLGW.

2. Tenn. Code Ann. § 7-52-402 applies to the Telecommunications Division of the Electric Division of MLGW.

MLGW seeks to participate in a business venture with Memphis Broadband for the purpose of providing telecommunications services pursuant to Tenn. Code Ann. § 7-52-103 (d). Tenn. Code Ann. § 7-52-103(d) expressly states that such a joint venture or any other business relationship with one or more third parties is subject to the provisions of Tenn. Code Ann. §§ 7-52-402 – 407. Therefore, Tenn. Code Ann. § 7-52-402 applies to MLGW’s Electric Division and the Telecommunications Division thereof.

B. Do Tenn. Code Ann. § 65-25-231 (a)(2), § 7-52-402, or any other statute permit the equity investment by the Telecommunications Division of the Electric Division of Memphis Light Gas & Water to Memphis Networkx, LLC?

¹ A "cooperative" is defined as: “one (1) or more nonprofit cooperative membership corporations heretofore or hereafter organized under or otherwise subject to this part, including corporations transacting business in Tennessee pursuant to § 65-25-221 under this part or under its predecessor, the Electric Cooperative Law, hereinafter called "foreign corporations". Tenn. Code Ann. § 65-25-202 (4) (1999).

(Yes. Tenn. Code Ann. § 7-52-103(d) permits the Telecommunications Division's equity investment in Memphis Networkx.)

In Tenn. Code Ann. § 7-52-103(d), the General Assembly granted a municipal electric utility, such as MLGW, authority “to establish a joint venture or any other business relationship with one or more third parties to provide [telecommunications] services, subject to the provisions of §§ 7-52-402 – 7-52-407.” The plain and clear language – the authorization to enter into “any other business relationship” – could not have been broader. The express reference to Tenn. Code Ann. § 7-52-403(a), which is obviously included within “7-52-402 – 7-52-407,” further confirms this broad grant of authority. That statute grants MLGW “all the powers, obligations and authority granted entities providing telecommunications services under applicable laws of the United States or the State of Tennessee.” Tenn. Code Ann. § 7-52-403(a). Equity investments are necessarily included in the powers that other telecom entities enjoy, and thus are also enjoyed by MLGW.

While Tenn. Code Ann. § 7-52-103(d) clearly authorizes MLGW to make this equity investment in Memphis Networkx, nothing in that statute expressly requires that MLGW make this investment through a separate division. The requirements of Tenn. Code Ann. § 7-52-402, however, do support the wisdom of MLGW's decision to make this equity investment through a sub-division of its Electric Division. Compliance with Tenn. Code Ann. § 7-52-402 was MLGW's primary purpose in forming the Telecommunications Division and Memphis Networkx as a separate legal entity. (Pre-Filed Testimony of Ward Huddleston, Jr., p. 6.) In

addition to this structural separation between MLGW and Memphis Network, the separate nature of the Telecommunications Division will further facilitate allocation of internal costs associated with the project.

The very broad statutory authority under Tenn. Code Ann. § 7-52-103(d) authorizes MLGW's Electric Division to make an equity investment in Memphis Network. Considered in light of the subsidy prohibitions under Tenn. Code Ann. § 7-52-402, MLGW's creation of a Telecommunications Division of the Electric Division is an appropriate exercise of the power granted under Tenn. Code Ann. § 7-52-103(d) and allows MLGW to appropriately track its equity investment and appropriately capture costs associated with MLGW's telecommunications investment.

III. Issue #2

Please identify and explain the criteria the Authority should use when approving an operating agreement under Tenn. Code Ann. § 7-52-103(d).

- A. The criteria for approval of the Amended and Restated Operating Agreement should only be the specific criteria enumerated in Tenn. Code Ann. § 7-52-103 (d), and review of the legal issues over which the TRA has jurisdiction and over which it has exercised or will exercise its jurisdiction with respect to other CLECs.**

State law provides that the "joint venture or business relationship" shall be subject to regulation by the TRA *"in the same manner and to the same extent as other certified providers of telecommunications services..."* Tenn. Code Ann. § 7-52-103 (d) (Emphasis supplied). Thus, although the statute requires approval of the Amended and Restated Operating Agreement, the General Assembly has only

extended jurisdiction to the Authority to regulate this business relationship *to the same extent* that the Authority regulates other providers. Therefore, the Amended and Restated Operating Agreement must be viewed in light of the same statutory requirements that are placed on all providers.

Although the Intervenor will likely contend that the statute allows the TRA to consider any and all arguments (couched as “criteria”) as a basis for disapproval of the Amended and Restated Operating Agreement, the General Assembly has placed limits on the jurisdiction that the TRA may exert over these business relationships. The provision concerning approval of the operating agreement ends with the following language:

This provision shall not apply to any *related service or transaction* which is not subject to regulation by the Tennessee Regulatory Authority.

Tenn. Code Ann. § 7-52-103 (d) (Emphasis supplied). Due to this limitation, and the limitation above that the business relationship be regulated in the same manner as other CLECs, three requirements can be found in the law. First, in reviewing the Amended and Restated Operating Agreement, the TRA may only consider issues specifically set forth in Tenn. Code Ann. § 7-52-103 (d). Second, the TRA may only consider issues over which it has separate and independent jurisdiction; third, if the TRA does possess independent jurisdiction, the TRA must only exercise that jurisdiction in the same manner that it would concerning other CLECs.

Thus, the criteria for evaluation of the Amended and Restated Operating Agreement set forth in Tenn. Code Ann. § 7-52-103 (d) are as follows:

1. Did the municipal electric plant receive authorization from its board or supervisory body as required in Tenn. Code Ann. § 7-52-103 (d) for creation of the joint venture?

2. Was a “joint venture or any other business relationship with one (1) or more third parties” established as set forth in Tenn. Code Ann. § 7-52-103 (d)?

3. Were notice and an opportunity to be heard on the Amended and Restated Operating Agreement provided to interested parties as required in Tenn. Code Ann. § 7-52-103 (d)?

1. **MLGW received authorization from its Board to establish the business relationship with Memphis Broadband consistent with Tenn. Code Ann. § 7-52-103(d).**

Tenn. Code Ann. § 7-52-103 (d) authorizes electric plants “*acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant*” to establish a joint venture or other business relationship to provide telecommunications services. (Emphasis supplied.) No other approvals, except that of the TRA, are required by the statute.

The board or supervisory body having responsibility for MLGW is the Board of Commissioners, who are appointed by the Mayor and confirmed by the City Council. (Thompson, Tr. Vol. IX-A, p. 26, ln. 6-10 and Vol. X-B, p. 112, ln. 8-10.) On

March 4, 1999, the Board of Commissioners of MLGW unanimously approved a resolution to initiate and establish a telecommunications entity. (See Exhibit D to the Application; Hearing Exhibit 3; Williams, Tr. Vol. II-B, p. 56, ln. 2-6.)

Subsequently, on August 19, 1999, the Board unanimously approved a resolution to establish the Telecommunications Division as a subdivision within the Electric Division. Included in this resolution by the Board, was specific authorization for the Telecommunications Division, acting through the direction of the President and Chief Executive Officer or his designee, to “organize, create, manage, operate, either wholly or *jointly with others*, an entity to provide or perform those services authorized for the Telecommunications Division.” (See Exhibit D to Application. (Emphasis added.)) The Board later adopted a resolution that authorized MLGW President Herman Morris to negotiate and enter into the Operating Agreement, and the subsequent Amended and Restated Operating Agreement, which formalized the joint venture. (See Hearing Exhibit 3.) No additional approvals were needed from the Board to execute the Amended and Restated Operating Agreement.²

Thus, the MLGW Board provided the necessary approval to MLGW to establish Memphis Networx, as required by state law.

² The Board, however, was kept up to date on the status of the transfer of A&L's interest to Memphis Broadband and the revisions to the operating agreement. See Exhibit A to the Pre-filed Supplemental Testimony of William Larry Thompson.

2. The structure of the business relationship entered into by the Joint Petitioners is authorized by Tenn. Code Ann. § 7-52-103.

The statute authorizes municipalities, acting through the municipal electric plants, to establish a “joint venture or any other business relationship with one (1) or more third parties” to provide related services.³ Tenn. Code Ann. § 7-52-103 (d). Counsel for Time Warner and TCTA argued in his closing statement that he couldn’t put his arms around what type of entity Memphis Networx was and that in his mind it was not a “joint venture.” (Tr. Vol. XIII-B, p. 96.) This distinction, however, is not determinative under the statute: the statute does not limit the type of entity that may be established by a municipal utility to joint ventures. The statute also authorizes the establishment of “any other business relationship” between municipal electric utilities and one or more third parties. Tenn. Code Ann. § 7-52-103 (d). Thus, Memphis Networx, a limited liability company with two members, MLGW and Memphis Broadband, easily meets the definition of “any other business relationship” as allowed by statute.

3. Notice and an opportunity to be heard were and will be provided to interested parties as required in Tenn. Code Ann. § 7-52-103(d).

Tenn. Code Ann. § 7-52-103 (d) requires that any contract or agreement, such as the Amended and Restated Operating Agreement, between a municipal electric

³ A joint venture is defined as “a business undertaking by two or more persons engaged in a single defined project.” BLACK’S LAW DICTIONARY 843 (7th Ed. 1999). MLGW and Memphis Broadband have entered into Memphis Networx for the purposes of providing telecommunications services as provided by state law. (Section 2.5 (b), Amended and Restated Operating Agreement.) Under this definition, Memphis Networx appears to be a joint venture. Notwithstanding this argument, even if

system and a third party for the provision of telecom services be approved by the Authority before it can become effective. As part of this approval requirement, the statute requires that "notice and opportunity to be heard" be extended to interested parties.

The Application and original Operating Agreement were filed on November 24, 1999. Notices were issued and hearings were held over a period of four months, July through October, 2000.

The Amendment to the Application was filed on December 21, 2000. Notice for the hearings to be held on March 26, 27 and 28, 2001 was issued by the Authority through its Order of February 16, 2001, meeting the "reasonable notice" requirements set forth in Tenn. Code Ann. §§ 4-5-307, 65-2-108 for contested cases. The notice requirements of these statutes have been met.

Although not yet completed with respect to the Amended and Restated Operating Agreement, the opportunity to be heard was also extended to numerous interested parties relative to the original Operating Agreement. In total, intervention was granted to eleven parties including NextLink, Tennessee, Inc., which withdrew its intervention; Time Warner of the Mid-South, LP; Time Warner Communications of the Mid-South, LP; Tennessee Cable Telecommunications Association; BellSouth Telecommunications, Inc.; Concord Telephone Exchange,

Memphis Networx is not deemed a joint venture, Memphis Networx certainly meets the definition of "any other business relationship" authorized by statute.

Inc.; Humphreys County Telephone Company; Tellico Telephone Company, Inc.; Tennessee Telephone Company; IBEW; and the Consumer Advocate Division. Although no additional parties have intervened since the filing of the Amendment, IBEW has withdrawn due to the fact that their previous concerns had been alleviated by the sale of A&L's interest to Memphis Broadband. (Motion to Withdraw and Dismiss Petition to Intervene of the International Brotherhood of Electrical Workers, Local 1288, p. 1.)

Due to the pendency of the March hearings, the complete opportunity to be heard on the Amended and Restated Operating Agreement has not yet occurred and will be addressed in the post-hearing brief.

IV. Issue #3

1. Issues concerning the Request for Proposal process lie within the jurisdiction of Shelby County Courts, not the Authority.

A. The terms of the Request for Proposal require all disputes to be brought in Shelby County courts.

As a threshold matter, the Applicant and Joint Petitioners respectfully submit that issues related to the Request for Proposal are beyond the jurisdiction of the Authority in this case. Assuming that MLGW was required to issue a request for proposal, the terms of the request for proposal itself would govern any deficiencies in the process. There is no provision in the Request for Proposal that details the rights of parties who were not awarded the Request for Proposal. However, in Article XIII of the Request for Proposal (Hearing Exhibit 81), the following language is found:

All actions, whether sounding in contract or in tort, relating to the validity, construction, interpretation, and enforcement of this Contract shall be instituted and litigated in the courts of the State of Tennessee, and in no other. In accordance herewith the parties to this Contract submit to the jurisdiction of the courts of State of Tennessee, located in Shelby County, Tennessee.

This issue, similar to the public records dispute, is outside of the scope of this proceeding and is vested in another forum.⁴

B. The parties to this proceeding lack standing to challenge the Request for Proposal process.

With respect to these particular issues, the Applicant and Joint Petitioners further submit that, even if issues relating to the Request for Proposal were within the Authority's jurisdiction, principles of standing would preclude the Authority's consideration of these issues. The Tennessee courts have granted standing to unsuccessful bidders, but not beyond. (See, e.g., Browning-Ferris Indus., Inc. v. City of Oak Ridge, 644 S.W.2d 400, 401 (Tenn. Ct. App. 1982) (recognizing standing of apparent low bidder); Metropolitan Air Research Testing Auth., Inc. v. Metropolitan Gov't of Nashville and Davidson County, 842 S.W.2d 611, 617 (Tenn. Ct. App. 1992) (extending standing to bidders other than apparent low bidder).) At no point in this proceeding has any party contended that it was an unsuccessful respondent to the Request for Proposal and sought relief from the Authority on that basis. Notably, the only known disappointed respondent did not even file any kind of formal objection with MLGW. (Thompson, Tr. Vol. X-D., p. 189, ln. 14-16.)

⁴ It is important to note, however, that no lawsuits have been brought against MLGW concerning an improper award of this contract, and in fact no formal objections were received by MLGW

Subject to and without waiver of these threshold issues, MLGW has satisfied and exceeded all procurement requirements applicable to the Memphis Networkx project. Indeed, although it was not legally required to issue a Request for Proposal, MLGW used the Request for Proposal process to explore its strategic partnership⁵ options.

A. Was Memphis Light, Gas & Water required to issue a Request for Proposal? (No.)

1. MLGW was not required to issue a Request for Proposal for the Memphis Networkx project.

Simply put, MLGW was not required to issue a Request for Proposal for the Memphis Networkx project because MLGW did not purchase goods or services from A&L. Of the three potentially applicable legal requirements governing MLGW's procurement process described below, each of these requirements applies to the purchasing of certain goods and services. None apply to the formation of business relationships with one or more third parties as authorized in Tenn. Code Ann. § 7-52-103(d). Absent some affirmative charter or statutory requirement, municipal contracts need not be let under competitive bidding. (McQuillin Mun. Corp. § 29.31 (3rd ed. 1999).)

complaining of the Request for Proposal ("RFP") process by persons who responded to the RFP. (Thompson, Tr. X-D, p. 189, ln 14-16.)

⁵ The Request for Proposal uses the term "telecommunications strategic partnership," which should be interpreted in lay terms without any legal connotation. The use of the term "telecommunications strategic partner", "partner" or "partnership" in this Section is not intended to imply or create any other relationship between the Joint Petitioners other than that of members in Memphis Networkx, LLC.

There are three potential sources of bidding requirements for MLGW—the MLGW Charter, the Municipal Purchasing Law of 1983, Tenn. Code Ann. § 6-56-301, et seq., and the Municipal Electric Plant Law of 1935, Tenn. Code Ann. § 7-52-101, et seq. Another statute, Tenn. Code Ann. § 12-3-1007, increases the bid threshold for large municipalities to \$10,000, although the applicability of this statute to arms or agencies of large municipalities, such as MLGW, has not been resolved. Each of these requirements, while varying in scope, applies only to leases, lease-purchases and purchases of goods or services. None apply to the combination of the capital of MLGW and Memphis Broadband (or previously A&L) that is involved in the Memphis Networx transaction.

The Charter of MLGW requires competitive bids for contracts for “equipment, apparatus, materials, or supplies,” and is silent on other MLGW expenditures. Section 681 of the Charter of MLGW provides:

[N]o contract for equipment, apparatus, materials, or supplies involving more than \$2,000.00 shall be made except after said contract has been advertised in the manner now or hereafter provided by law for the advertisement of contracts made by the City Council of the City of Memphis in the making of city contracts.

. . . The City Council of the City of Memphis . . . may raise by ordinance the amount of equipment, materials or supplies requiring newspaper advertisements for competitive bids

Similarly, the Municipal Purchasing Law of 1983, by its plain terms, only applies to “all purchases and leases or lease-purchase agreements” (Tenn. Code Ann. § 6-56-304; see Tenn. Code Ann. § 6-56-302 (“This part shall apply to all

purchases by authorized officials in all municipalities . . .”).) There is some question by virtue of Tenn. Code Ann. § 6-56-302(1) as to the applicability of the Municipal Purchasing Law of 1983 to MLGW, but even if it does apply, those statutes are limited to “purchases” as well. (See Tenn. Code Ann. § 6-56-302(1) (“This part shall not apply to purchases by authorized officials in municipalities having charter provisions or private act requirements governing competitive bidding and purchasing”); Op. Tenn. Att’y Gen. 89-127, 1989 Tenn. AG LEXIS 92 (September 29, 1989) (analyzing relationship between county Private Act purchasing requirements and a provision under the County Purchasing Law of 1983 that is similar to Tenn. Code Ann. § 6-56-302(1) and opining that County Purchasing Law of 1983 applies in areas not covered by private act requirements).

Finally, a provision within the Municipal Electric Plant Law of 1935, Tenn. Code Ann. § 7-52-117(d), provides additional authority to MLGW to enter into certain contracts for less than \$50,000 without the necessity of competitive bids. Again, this supplemental authority to make purchases without the necessity of competitive bids does not create any obligation applicable to the Memphis Networkx transaction.

There are no charter or statutory requirements that require MLGW to follow the Request for Proposal process for the Memphis Networkx transaction. Absent such requirements, MLGW was not required to issue a Request for Proposal.

B. What procedural requirements must Memphis Light, Gas & Water follow when proceeding through the Request for Proposal process?

- 1. When a Request for Proposal is required (which is not the case here), MLGW must follow applicable charter or statutory requirements, if any, and the procedural requirements outlined in the Request for Proposal.**

Assuming for purposes of this analysis that MLGW is required to issue a Request for Proposal prior to entering into a transaction (which is not the case here), MLGW would be required to follow any applicable charter or statutory requirements and its own procedural requirements as outlined in the applicable Request for Proposal document.

Tennessee courts have acknowledged that, where competitive bidding statutes apply, governmental entities must invite proposals “under fair circumstances which afford a fair and reasonable opportunity for competition.” State ex rel. Leech v. Wright, 622 S.W.2d 807, 815 (Tenn. 1981) (quoting McQuillin Mun. Corp. § 29.52). In Wright, the Court outlined the essential elements of the purchasing process, in the context of reviewing the purchasing requirements under the Lincoln County Private Act:

Thus, we hold that the minimum requirements for complying with the private act applicable to defendant are as follows: notification to interested bidders by a method designed to reach bidders likely to be interested, either by direct mail, newspaper advertising, posting of notices in public places, or any combination thereof, such notification to contain substantially the following information: (1) specification of the supplies or equipment to be purchased and the quantity thereof; (2) the time-frame for delivery if relevant; (3) the deadline for

submitting bids . . . and the address of the office to which the bids should be submitted; (4) the time and place that the bids would be opened

Wright, 622 S.W.2d at 815.

A Request for Proposal differs from the bids for purchases referenced in Wright in the sense that bids seek price quotes for standardized purchases, while a Request for Proposal seeks proposals to accomplish a desired result without necessarily mandating the process for accomplishing that result.⁶ In any event, a Request for Proposal must necessarily include the basic elements outlined in Wright— the project specifications, the relevant time frame, the deadline and place for submitting proposals, and the basis under which the bids would be analyzed.

Governmental entities can certainly include additional elements as well. As the sample Requests for Proposal included as Hearing Exhibit 97 show, MLGW often does include additional elements, and in such a case, a court would likely require MLGW to fairly consider the responses to the Request for Proposal in light of all elements included in the Request for Proposal. (See Metropolitan Air Research Testing Auth., 842 S.W.2d at 616 (recognizing that competitive bidding requirements impose an implied obligation to consider all bids honestly and fairly); Computer Shoppe, Inc. v. State, 780 S.W.2d 729, 737 (Tenn. Ct. App. 1989) (same).)

⁶ Broadly worded Requests for Proposal are not uncommon for a governmental entity. A recent Court of Appeals case documents a broadly worded Request for Proposal of the City of Memphis that included two elements that would be negotiated following review of the submitted proposals. Engenius Entertainment, Inc. v. Herenton, 971 S.W.2d 12 (Tenn. Ct. App. 1997).

Even though MLGW was not required to issue a Request for Proposal for the Memphis Networx project, it did issue a Request for Proposal. In issuing and administering the Request for Proposal process, MLGW satisfied the basic elements of the Wright test and fairly considered all proposals in accordance with the terms of the Request for Proposal.

C. Assuming Memphis Light, Gas & Water was not required to issue a Request for Proposal, was it bound to follow the procedural requirements discussed in the answer to B. once it chose to issue a Request for Proposal?

- 1. MLGW was not bound to follow the procedural requirements outlined in response to Subsection B; nevertheless, MLGW did follow those requirements.**

The Applicant and Joint Petitioners have been unable to locate any Tennessee authority addressing whether, even though MLGW was not required to issue a Request for Proposal, MLGW was legally required to follow the procedural requirements addressed in Section B once it chose to issue a Request for Proposal. Courts from other jurisdictions have recognized that, absent a competitive bid requirement, contracting decisions of governmental entities are discretionary with the governing body.⁷ Some courts have qualified that general rule to require that, in reasoning similar to that contained in Wright, once a governmental entity has

⁷ See Case-Brothers Co., Inc. v. City of Ottawa, 602 P.2d 1316, 1319 (Kan. 1979) (upholding discretionary authority of governmental officials, absent fraud, and relying upon invitation to bid language giving the entity the right to reject any or all bids); Kudinger v. City of Saginaw, 93 N.W. 914, 917 (Mich. 1903) (noting that where charter provisions do not require contracts to be let to the lowest bidder, the contracting decision is discretionary with the governing body, whose acts are final when made in good faith); Irwin Marine, Inc. v. Blizzard, Inc., 490 A.2d 786, 789-90 (N.H. 1985) (acknowledging discretion of local officials, but holding that discretion must be “bounded by notions of fairness in order that the public interest and public confidence in governmental actions be upheld”).

chosen a public bidding procedure, the governmental entity must treat all bidders fairly.⁸ Whether or not MLGW was bound to follow the procedural requirements of its Request for Proposal, the proof in this case shows that MLGW reserved discretion to develop its telecommunications strategic partnership and, in exercising its reserved discretion, treated all bidders fairly.

The Request for Proposal provided a clear basis for fair and reasonable competition to become MLGW's telecommunications strategic partner, and the Request for Proposal easily met the key elements as outlined in Wright—MLGW actively sought the participation of over 100 potentially qualified companies (Thompson, Tr. Vol. IX-D, p.173: 8, Hearing Exhibit 83), the Request for Proposal identified the purpose of the request (Hearing Exhibit 81, Section I, p. 2), the address to which proposals should be submitted (Hearing Exhibit 81, Section II, p. 2), the deadline for submitting proposals (Hearing Exhibit 81, Section IV, p. 2), and the method and criteria for evaluation of proposals (Hearing Exhibit 81, Sections V & VI, pp. 2-3).

At the same time, Section VI of the Request for Proposal reserved substantial discretion to MLGW's management team in evaluating proposals, in developing the terms of its proposed telecommunications strategic partnership, and in ultimately selecting its strategic partner:

MLGW reserves the right, without qualification to:

⁸ Irwin Marine, 490 A.2d at 790.

1. select any proposal as a basis for written or oral discussion with any or all of the Firms when such action is considered to be in the best interest of MLGW;
2. to reject all proposals;
3. and to exercise discretion and apply [its judgment] with respect to any proposals submitted.

(Hearing Exhibit 81, Section VI, p. 3; Stinson, Tr. Vol. XI-D, p.21, ln. 10-22; p. 22, ln. 3-7.)

There has been no evidence in this case that MLGW either failed to follow the process outlined in its Request for Proposal or abused its discretion in developing its telecommunications strategic partnership with A&L. Indeed, after considering that MLGW was not required to issue a Request for Proposal at all, it is clear that MLGW utilized the Request for Proposal process to explore its strategic partnership options.

2. MLGW issued the Request for Proposal to explore possible telecommunications strategic partnerships, whether or not any proposer, including A&L, was chosen.

Because MLGW was not legally required to issue a Request for Proposal for this project, Time Warner and TCTA's unsupported contention that MLGW had previously agreed to award the contract to A&L is patently illogical. Had MLGW intended to award the contract to A&L all along, MLGW could have simply entered into a contract at any time in middle to late 1998 without even issuing a Request for Proposal. Instead, notwithstanding A&L's immediate interest in the project,

MLGW logically and prudently chose to issue the Request for Proposal to consider a broad range of options and to obtain the most favorable strategic relationship.

In response to Director Greer's comment that "the perception was the bidding process was closed before it was ever opened," MLGW's Larry Thompson unequivocally stated "I can assure you that's not the case." (Thompson, Tr. Vol. X-B, pp. 95, ln. 25; p. 96, ln. 1-3.) The undisputed evidence in this case confirms Mr. Thompson's assurance to Director Greer. Mr. Thompson testified that even though he believed that no competitive procurement process was required, he chose the process "from day one." (Thompson, Tr. Vol. IX-B, p. 70, ln. 3-5.) From the beginning, Mr. Thompson made it clear that MLGW intended to explore the available options through this process:

I think I had stated that it was my position from the beginning that we would consider alternative concepts, alternative proposals, alternative companies as a – as a potential partner or a participant in this project. That was conveyed to Mr. Lowe from the beginning.⁹

(Thompson, Tr. Vol. IX-B, p. 68, ln. 18-23. See also Thompson, Tr. Vol. IX-D, p.169, ln. 17-18 (with respect to the breadth of the Request for Proposal, MLGW "wanted to know what blue sky ideas were out there as well as well-developed ideas"); Id., at p. 171, ln. 25; p.72, ln. 1 ("what we [MLGW] did was go out with a very broad Request for Proposal that was wide open").)

⁹ Mr. Lowe also testified at the hearing that, notwithstanding his and his company's substantial commitment of time and resources from April of 1998 until the issuance of the Request for Proposal, he had "absolutely no knowledge or guarantee" that MLGW would even decide to issue a Request for Proposal, much less subsequently award the contract to A&L. (Lowe, Tr. Vol. IX-C, p. 87, ln. 15-16.)

Similarly, in response to a question from Chairman Kyle regarding the Request for Proposal process, MLGW's Vice President of Construction and Maintenance, Wade Stinson, testified about the intentionally broad scope of the Request for Proposal:

[The Request for Proposal] was made very broad too, because we didn't know exactly what we wanted, so we intentionally made this Request for Proposal broad to accommodate a number of different ideas.

(Stinson, Tr. Vol. XI-B, p. 14, ln. 21-24.)

The plain language of the Request for Proposal and MLGW's conduct throughout the Request for Proposal process provide further evidence of MLGW's desire to explore available options. For example, Section V of the MLGW Proposal form provides in bold letters that "**MLGW wishes to encourage creativity and seeks the widest range of potential respondents and concepts.**" (Hearing Exhibit 81, Section V, p. 6.) In issuing the Request for Proposal, MLGW provided copies to over 100 potential respondents. (Thompson, Tr. Vol. IX-D, p. 173, ln. 8; Hearing Exhibit 83.) MLGW held a mandatory pre-bid meeting that was designed to make MLGW representatives "available," and approximately 25 persons attended that meeting. (Thompson, Tr. Vol. IX-D, p. 175, l. 7; Stinson, Tr. Vol. XI-B, p. 14, ln. 1-5.) MLGW allowed additional time in the process to ensure that interested parties had appropriate time to access MLGW's employees and all necessary information. (Thompson, Tr. Vol. IX-B, p. 68, ln. 24-25; p.69, ln. 1-12.) In fact,

every act of MLGW was consistent with its desire to explore available options; none suggest that the award to A&L was in any way pre-ordained.

The theories of Time Warner and TCTA regarding MLGW's Request for Proposal are simply unfounded. MLGW had the legal authority to directly contract with A&L without the necessity of a competitive Request for Proposal process. Had MLGW not been interested in exploring other available options, it surely would have contracted directly with A&L without issuing the Request for Proposal. Having issued the Request for Proposal, MLGW complied with its terms and properly selected and contracted with A&L to form Memphis Networkx.

- D. Assuming Memphis Light, Gas & Water was required to issue a Request for Proposal, but failed to follow the requirements discussed in the answer to B., how is the transfer of interest from A&L Networks-Tennessee, LLC to Memphis Broadband affected? (Notwithstanding Applicant's assertion that it followed all applicable procedural requirements, even if Applicant had failed to follow such requirements, the interest acquired by Memphis Broadband would not be affected.)**

As discussed above, MLGW was not required to issue a Request for Proposal. Nonetheless, MLGW did follow the procedural requirements of the Request for Proposal process. Despite these assertions, assuming that MLGW was required to issue a Request for Proposal but failed to follow these procedural requirements, the interest acquired by Memphis Broadband is not affected.

1. The transfer of interest to Memphis Broadband is not affected.

The interest transferred to Memphis Broadband was not premised on the RFP, but in fact was governed by the terms of the Operating Agreement. After award of the Request for Proposal, A&L and MLGW entered into negotiations concerning a preliminary agreement. These preliminary negotiations, however, were superseded by the Operating Agreement which became the legal document governing the relationship between A&L and MLGW. (See Section 14.9 of the Operating Agreement, Exhibit E to the Application.) Case law holds that a written contract must prevail over previous or contemporaneous contradictory representations. Maddox v. Webb Construction Co., 562 S.W.2d 198 (Tenn. 1978); Cummings & Co. v. Mascari, 55 Tenn.App. 512, 402 S.W.2d 719 (Tenn. Ct. App. 1965); Patterson v. Anderson Motor Co., 45 Tenn.App. 35, 319 S.W.2d 492 (Tenn. Ct. App. 1959); Marron v. Scarbrough, 44 Tenn.App. 414, 314 S.W.2d 165 (Tenn. Ct. App. 1958). Thus, the Operating Agreement, not the RFP or any initial agreements between MLGW and A&L, governed the transfer of A&L's interest to Memphis Broadband.

The Operating Agreement required MLGW's consent for any transfer of A&L's interest in Memphis Networx. (Section 11.3, Operating Agreement.) Such consent was given, as evidenced by the Assignment of Membership Interest and Amendment to Operating Agreement of Memphis Networx, LLC, executed by MLGW, Memphis Broadband, and A&L, contained in the Responses to Data Request number 10 and as evidenced by Section 2 of the Amended and Restated

Umbrella (Exhibit X to the Amendment). Thus, the RFP, which was superseded by the Operating Agreement, did not and could not affect the transfer of interest from A&L to Memphis Broadband.

Furthermore, MLGW, as a municipal utility, has the discretionary power to exercise its business judgment to contract directly with Memphis Broadband, notwithstanding the results of the RFP process. (See McQuillen Mun. Corp. § 10.36 (3rd ed. rev. 1999) (discretionary powers include the business affairs of a municipality).) Courts have long refused to interfere with the exercise of these discretionary powers of municipal corporations. (McQuillen Mun. Corp. § 10.37 (3rd ed. rev. 1999).)

Once the Amended and Restated Operating Agreement was executed by MLGW and Memphis Broadband, the terms of that agreement, not the RFP, governed the interest of Memphis Broadband in Memphis Networx. The Authority's role is to approve the Amended and Restated Operating Agreement, not the RFP or the transfer of interest from A&L to Memphis Broadband, in accordance with the criteria of Tenn. Code Ann. § 7-52-103 (d), as discussed infra in Section III.

2. Any challenges to the Request for Proposal process must be decided by the Shelby County courts.

As discussed in Section A. above, the Request for Proposal requires all challenges to be brought in Shelby County court. Thus, only the Shelby County courts may determine what remedies, if any, should be granted to those parties who

have standing to challenge the Request for Proposal. No challenge has been filed, and none of the parties to this proceeding have standing to challenge the process.¹⁰

3. The Request for Proposal provides broad discretion to MLGW to reject proposals.

Due to the broad discretion granted to MLGW in the proposal, it is hard to imagine how an entity could have any claim based on a procedural defect. As quoted above, MLGW reserved the right to “reject all proposals” and “exercise discretion” with respect to any submitted proposals. Thus, even if some error occurred, it will be difficult for any entity with standing to prove that it was harmed by this defect when MLGW had the discretion to reject all proposals. Again, any question of whether such entity was harmed is not properly before this Authority and would be a question for the Shelby County courts.

V. Conclusion

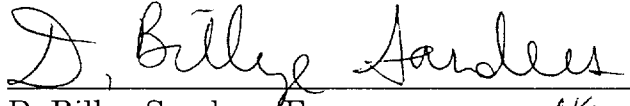
The General Assembly has authorized municipal electric utilities to enter into business relationships with other entities for the provision of telecommunications services through enactment of Tenn. Code Ann. §7-52-103 et seq. Memphis Networx was formed in accordance with this statute. The investment in Memphis Networx made by MLGW is authorized by this statute.

¹⁰ It is likely that the doctrine of laches would bar any future challenge to the RFP process. The Tennessee Supreme Court has found unexcused delay in asserting a claim as one of the essential elements of laches. Bernard v. Walker, 212 S.W.2d 600, 186 Tenn. 617 (Tenn. 1948). Due to the fact that the RFP was issued nearly seventeen months ago, any new claim would likely be barred.

The Amended and Restated Operating Agreement must only be evaluated according to the criteria contained in the statute, which relate to board authorization and a notice and opportunity to be heard.

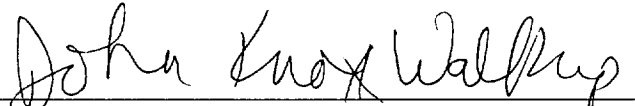
Although MLGW was not required to issue an RFP, MLGW followed all applicable procedural requirements in issuing its Request for Proposal. The transfer of ownership from A&L to Memphis Broadband is not affected in any way by the Request for Proposal process or any alleged defects in such process. Any disputes concerning the Request for Proposal process must be brought in Shelby County courts, and should not be determined or analyzed in this proceeding.

Respectfully submitted,

A handwritten signature in cursive script that reads "D. Billye Sanders".

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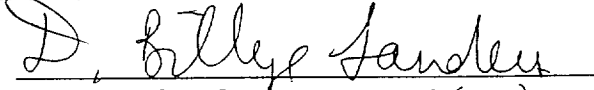
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CERTIFICATE OF SERVICE

I, D. Billye Sanders, hereby certify that on this 1st day of March, 2001, a true and correct copy of the foregoing was delivered by hand delivery, facsimile or U.S. Mail postage pre-paid to the Counsel of Record listed below.


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